No. 94-833

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ASARCO INCORPORATED,
Petitioner,
v.
LOUSIANA-PACIFIC CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents the Port of Tacoma, Louisiana-Pacific Corporation, Portac, Inc., Cascade Timber Company, Murray Pacific Corporation, and Wasser & Winters Company object to Asarco's statement of the questions presented and restate them as follows:

1. Whether copper reverbatory slag, and its constituent heavy metals arsenic, lead, copper and zinc are "hazardous substances" under CERCLA section 101(14), 42 U.S.C. § 9601(14), even though some wastes from the extraction, benefication and processing of ores and minerals are excluded from regulation under RCRA Subtitle C, 42 U.S.C. § 6921(b)(3)(A).

2. Whether the district court's factual finding that Asarco had "arranged for disposal" of a hazardous substance within the meaning of CERCLA section 107 (a)(3), 42 U.S.C. § 9607(a)(3), was clearly erroneous.

PARTIES TO THE PROCEEDING

Asarco Inc., Petitioner
B&L Trucking and Construction Co., Respondent
Cascade Timber Co., Respondent
Eagle Trucking, Inc., Respondent
Executive Bark, Inc., Respondent
Industrial Mineral Products, Inc., Respondent
Louisiana-Pacific Corp., Respondent
Murray Pacific Corp., Respondent
Port of Tacoma, Respondent
Portac, Inc., Respondent
Wasser & Winters Co., Respondent
William B. Fjetland, Respondent

RULE 29.1 LISTING

Pursuant to Rule 29.1, respondents the Port of Tacoma, Louisiana-Pacific Corporation, Portac, Inc., Cascade Timber Company, Murray Pacific Corporation, and Wasser & Winters Company disclose that none of them have subsidiaries and affiliates that have issued shares to the public.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.1 LISTING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW AND JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE NINTH CIRCUIT'S CONCLUSION THAT COPPER SLAG AND ITS CONSTITUTENT HEAVY METALS MAY BE "HAZARDOUS SUBSTANCES" IS CONSISTENT WITH OTHER FEDERAL DECISIONS AND DOES NOT PRESENT AN OPPORTUNITY FOR THIS COURT TO SETTLE AN IMPORTANT ISSUE OF FEDERAL LAW	5
A. Without Conflict, Federal Courts Hold That Bevill Mining Wastes May Be Hazardous Substances If They Contain Or Release Substances That Are Themselves Defined As Hazardous By CERCLA	7
B. The Ninth Circuit's Decision Does Not Conflict With Any Decisions Of This Court	10
C. This Court Need Not Grant Certiorari To Settle An Important Issue Of Federal Law	12

TABLE OF CONTENTS—Continued

Page

II. THE NINTH CIRCUIT'S DECISION TO AFFIRM THE TRIAL COURT'S FACTUAL FINDING THAT ASARCO "ARRANGED FOR THE DISPOSAL" OF SLAG IS NOT INCONSISTENT WITH ANY OTHER FEDERAL APPELLATE DECISION AND DOES NOT PRESENT AN OPPORTUNITY FOR THIS COURT TO SETTLE AN IMPORTANT ISSUE OF FEDERAL LAW 12

A. Federal Courts Agree That Sales May Constitute Arrangements For Disposal Depending Upon The Facts Surrounding The Transactions 14

B. The Ninth Circuit's Decision Does Not Conflict With *American Mining Congress* Or Other Decisions Interpreting RCRA 15

C. The Ninth Circuit's Decision Affirming The District Court's Finding That Asarco Arranged For Disposal Of Slag Does Not Present An Opportunity To Settle An Important Issue Of Federal Law 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases Page

American Mining Congress v. United States E.P.A., 824 F.2d 1177 (D.C. Cir. 1987) 15, 16
Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989) 6
B.F. Goodrich v. Murtha, 958 F.2d 1192 (2d Cir. 1992) 6
Catellus Dev. Corp. v. United States, 34 F.3d 748 (9th Cir. 1994) 15
Chatham Steel Corp. v. Brown, 858 F. Supp. 1130 (N.D. Fla. 1994) 15
Chesapeake & Potomac Tel. Co. of Va. v. Peck Iron & Metal Co., 814 F. Supp. 1269 (E.D. Va. 1992) 15
Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 12
Commissioner of Internal Revenue v. Asphalt Prod. Co., 482 U.S. 117 (1987) 11
Dayton Indep. School Dist. v. U.S. Mineral Prod., 906 F.2d 1059 (5th Cir. 1990) 14
Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989) 6
Eagle-Picher Industries v. E.P.A., 759 F.2d 922 (D.C. Cir. 1985) 7, 8, 10, 11
Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313 (11th Cir. 1990) 14, 15, 17
Fretag v. Commissioner of Internal Revenue, 111 S. Ct. 2631 (1991) 10
Johnson v. Transportation Agency, 480 U.S. 616 (1987) 11
K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 12
Kelly v. Arco Indus. Corp., 19 Chem. Waste Lit. Rptr. 1342 (W.D. Mich. 1990) 14
Mallard v. United States Dist. Court for the Southern Dist. of Iowa, 490 U.S. 296 (1989) 10
New York v. General Elec. Co., 592 F. Supp. 291 (N.D.N.Y. 1984) 15
Owen Electric Steel Company of South Carolina, Inc. v. Browner, 37 F.3d 146 (4th Cir. 1994) 16

TABLE OF AUTHORITIES—Continued

	Page
Prudential Ins. Co. v. United States Gypsum, 711 F. Supp. 1244 (D.N.J. 1989)	14
Ratzlaf v. United States, 114 S. Ct. 655 (1994)	11
Sedima S.P.R.I. v. Imrex Co., 473 U.S. 479 (1985)	11
State of Ariz. v. Motorola, 774 F. Supp. 566 (D. Ariz. 1991)	16
State of Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986)	8
State of Idaho v. Hanna Min. Co., 699 F. Supp. 827 (D. Idaho 1987), *aff'd*, 882 F.2d 392 (9th Cir. 1989)	8
States v. BFG Electroplating Corp., 31 Env't Rep. Cas. (BNA) 1174, 1183 (W.D. Pa. 1990)	15
Stevens Creek Associates v. Barclays Bank of California, 915 F.2d 1355 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991)	14
T & E Indus. Inc. v. Safety Light Corp., 680 F. Supp. 696 (D.N.J. 1988)	8
United States v. A&F Materials Co., Inc., 582 F. Supp. 842 (S.D. Ill. 1984)	15
United States v. Alcan, 964 F.2d 252 (3d Cir. 1992)	6
United States v. Conservation Chem. Co., 619 F. Supp. 162 (D. Mo. 1985)	8, 15
United States v. Farber, 27 Env't Rep. Cas. (BNA) 1978 (D.N.J. 1988)	16
United States v. Iron Mountain Mines, 812 F. Supp. 1528 (E.D. Cal. 1992), *overruled by Louisiana-Pacific Corp. v. Asarco Inc.*, 24 F.3d 1565 (9th Cir. 1994)	8
United States v. James, 478 U.S. 597 (1986)	10
United States v. Metate Asbestos Corp., 584 F. Supp. 1143 (D. Ariz. 1984)	8
United States v. Monsanto, 491 U.S. 600 (1989)	11
United States v. Pesses, 794 F. Supp. 151 (W.D. Pa. 1992)	15
United States v. Union Gas Co., 586 F. Supp. 1522 (E.D. Pa. 1984)	8

TABLE OF AUTHORITIES—Continued

Page

United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985) 15

United States v. Westinghouse Elec. Corp., 14 Envtl. L. Rep. 20483 (S.D. Ind. 1983) 14

Federal Statutes

Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601-9675 ("CERCLA") ..... *passim*

Section 101(14), 42 U.S.C. § 9601(14) ..... *passim*

Section 101(29), 42 U.S.C. § 9601(29) 17

Section 107(a)(3), 42 U.S.C. § 9607(a)(3) ....i, 14, 16

Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k ("RCRA") ..... *passim*

42 U.S.C. § 6903(3) 17

Washington Statutes

Washington Hazardous Waste Management Act, Wash. Rev. Code § 7.105.005 *et seq.* 3

Washington Product Liability Act, Wash. Rev. Code § 7.72.010 *et seq.* 3

Legislative Materials

Report of the House Committee on Energy and Commerce, reprinted in SARA: The Legislative History (S. Clarkson & J. LaMoreaux eds., 1987) 11

131 Cong. Rec. S11680 (Sept. 18, 1985) 11

132 Cong. Rec. S14896 (Oct. 3, 1986) 11

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents the Port of Tacoma, Louisiana-Pacific Corporation, Portac, Inc., Cascade Timber Company, Murray Pacific Corporation, and Wasser & Winters Company (collectively "the Plaintiffs") oppose Asarco Incorporated's ("Asarco's") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW AND JURISDICTION

In its petition, Asarco has properly identified the opinions below, the basis for the district court's and the court of appeals' jurisdiction, as well as Asarco's basis for invoking this Court's jurisdiction.

RELEVANT STATUTORY PROVISIONS

Asarco has provided the full text of the statutory provisions relevant to its petition.

STATEMENT OF THE CASE

For almost a hundred years, Asarco operated a copper smelter in Tacoma, Washington, generating as much as 200,000 tons of copper reverbatory slag annually in the process. The slag produced each year contained significant quantities of hazardous heavy metals, including thousands of tons of arsenic, lead, copper and zinc. For decades, Asarco dumped its waste slag directly into Commencement Bay. When the Army Corps of Engineers prohibited Asarco from putting slag into the bay in the early 1970s, however, Asarco got rid of it by marketing it as an inert and environmentally safe fill material, even though Asarco knew that the slag, in fact, leached heavy metals.

By disposing of its waste slag through a marketing scheme, Asarco was able to continue smelting operations until 1985. Meanwhile, heavy metals leached off of slag-contaminated public and private lands located in and around the Commencement Bay tideflats. The Washington Department of Ecology ultimately required cleanup of the contamination, and EPA added many of the sites at issue in this litigation to the Superfund National Priorities List.

In 1988, the Plaintiffs brought claims against Asarco in the United States District Court for the Western District of Washington, seeking to recover cleanup costs and damages associated with seven sites contaminated with Asarco's slag and its constituent heavy metals. The Plaintiffs asserted claims under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-75, and a variety of state law theories. The Plaintiffs tried their CERCLA

claims to the court, while trying their state law claims to a jury.

In defense, Asarco argued, among other things, that it was not liable under CERCLA because slag was not a "hazardous substance," and because Asarco had not "arranged for the disposal" of the slag. The district court rejected both arguments and found Asarco liable under CERCLA. See Appendix to Asarco's Petition ("Pet. App.") at A-3 to A-5, and A-10 to A-16. The court concluded, as a matter of law, that the copper slag and its constituent heavy metals were "hazardous substances" under CERCLA, and it found, as a matter of fact, that Asarco had arranged for the disposal of its slag. *See id.* The jury also returned verdicts for the Plaintiffs on claims brought pursuant to Washington's Hazardous Waste Management Act, Wash. Rev. Code § 70.105.005 *et seq.*, and Washington's Products Liability Act, Wash. Rev. Code § 7.72.010 *et seq.* *See* Pet. App. at A-2 to A-3.

Asarco then appealed the district court's CERCLA judgment to the Ninth Circuit Court of Appeals.[1] The Ninth Circuit upheld the district court's CERCLA judgment, rejecting Asarco's contentions that slag and its constituent heavy metals were not "hazardous substances," and that Asarco had not "arranged for the disposal" of the slag. *See* Pet. App. at B-16 to B-22. Asarco now petitions this Court for a writ of certiorari regarding its two principal challenges to the district court's CERCLA judgment.

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[1] Asarco also appealed the jury's state law verdicts, and the Plaintiffs cross-appealed the district court's dismissal of certain other state law claims. *See* Pet. App. B.

SUMMARY OF ARGUMENT

Asarco asks this Court to grant certiorari to review a decision of the Ninth Circuit Court of Appeals affirming both the district court's legal ruling that slag containing hazardous heavy metals is a hazardous substance under CERCLA, and the district court's factual finding that Asarco had arranged for the disposal of its slag. These issues do not present the Court with a conflict among the federal courts of appeals, or an opportunity to settle a significant matter of federal law.

First, federal courts have consistently held that mining wastes, such as slag, may be hazardous substances under CERCLA if they contain substances otherwise falling within CERCLA's definition of "hazardous substance." The Ninth Circuit's decision and reasoning is also consistent with this Court's jurisprudence, as well as established EPA policy. This Court need not provide further guidance on this issue.

Second, federal courts have agreed that although sales of hazardous substances do not always constitute arrangements for disposal, characterizing a transaction as a sale does not, by itself, preclude CERCLA liability. Whether or not a particular sale is an arrangement for disposal requires a case-specific factual inquiry. The Ninth Circuit's decision to affirm the district court's factual finding that Asarco arranged for the disposal of its slag, is consistent with this federal case law. In light of the fact-specific nature of this issue, Asarco's petition does not present an opportunity for this Court to settle an important issue of federal law.

ARGUMENT

According to Supreme Court Rule 10.1, this Court considers granting certiorari (i) when decisions of the federal courts of appeals conflict, (ii) when a federal appellate decision conflicts with a decision of this Court, or (iii) when a federal appellate decision poses "an important question of federal law which has not been, but should be, settled by this Court." Asarco's petition for writ of certiorari does not present any of these circumstances.

I. THE NINTH CIRCUIT'S CONCLUSION THAT COPPER SLAG AND ITS CONSTITUENT HEAVY METALS MAY BE "HAZARDOUS SUBSTANCES" IS CONSISTENT WITH OTHER FEDERAL DECISIONS AND DOES NOT PRESENT AN OPPORTUNITY FOR THIS COURT TO SETTLE AN IMPORTANT ISSUE OF FEDERAL LAW.

Asarco contends that mining wastes such as slag that are exempt from regulation under the Resource Conservation and Recovery Act ("RCRA") subtitle C (also known as "Bevill wastes") and their constituents can never be "hazardous substances" under CERCLA. With the exception of a district court that was overruled, every federal court that has addressed this contention has rejected it. There is no confict among the circuits, and the Ninth Circuit's decision in this case does not conflict with the decisions of this Court. Consequently, there is no need for this Court to settle the issue.

CERCLA section 101(14), 42 U.S.C. § 9601(14) defines hazardous substances as:

> (A) any substance designated pursuant to section 1321(b)(2)(C) of Title 33,
>
> (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title,

> (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] (*but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress*),
>
> (D) any toxic pollutant listed under section 1317(a) of Title 33,
>
> (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and
>
> (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.
>
> The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

(Emphasis added.) Courts agree that a substance need only fall within one of this section's subparagraphs to be a "hazardous substance" under CERCLA. *See, e.g., United States v. Alcan,* 964 F.2d 252, 261 (3d Cir. 1992); *B.F. Goodrich v. Murtha,* 958 F.2d 1192, 1200 (2d Cir. 1992); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.,* 889 F.2d 1146, 1151-52 n.6 (1st Cir. 1989); *Amoco Oil Co. v. Borden, Inc.,* 889 F.2d 664, 669 (5th Cir. 1989).

Asarco's challenge to the Ninth Circuit's decision focuses on subparagraph (C), which designates all RCRA hazardous wastes, except wastes (such as Bevill wastes) that are excluded from regulation under RCRA, as

CERCLA hazardous substances. Asarco contends that by excluding Bevill wastes from the hazardous substances identified in subparagraph (C), Congress intended to exclude all Bevill wastes and their constituents from the definition of hazardous substances, even if some of them would otherwise qualify as hazardous substances under other subparagraphs of CERCLA's hazardous substance definition.

The Ninth Circuit rejected Asarco's argument, reasoning that according to the statute's unambiguous language, the Bevill exclusion limits only the hazardous substances identified in subparagraph (C), and has no effect on the hazardous substances identified by other subparagraphs. *See* Pet. App. at B-17 to B-18. Had Congress intended to exclude Bevill wastes from CERCLA altogether, it would have added a provision similar to the petroleum exclusion, which is found at the end of the hazardous substance definition. *Id.* at B-18. The Ninth Circuit also explained that if the statute were ambiguous, which it is not, then the court would have reached the same result by deferring to EPA's interpretation of the statute. *See* Pet. App. at B-19 to B-20.

A. Without Conflict, Federal Courts Hold That Bevill Mining Wastes May Be Hazardous Substances If They Contain Or Release Substances That Are Themselves Defined As Hazardous By CERCLA.

There is no conflict among the circuits about the status of Bevill wastes. In *Eagle-Picher Industries v. E.P.A.*, 759 F.2d 922, 927 (D.C. Cir. 1985), the D.C. Circuit unambiguously held that:

> a substance is a hazardous substance within the meaning of CERCLA if it qualifies under any of the several subparagraphs of section 101(14). The exception for mining wastes and fly ash is found only in a parenthetical clause in subparagraph (C). The ordinary, straightforward reading of that exception

> is that it applies only to subparagraph (C), not to any of the other five subparagraphs. Had Congress intended to exempt mining wastes and fly ash from the entirety of section 101(14), it obviously could have placed the exemption at the beginning or end of the section, not in one of the several subparagraphs.

Eagle-Picher, 759 F.2d at 927. With the exception of one district court that the Ninth Circuit overruled,[2] every federal court that has considered this issue has agreed with the Ninth and the D.C. Circuits. *See T & E Indus. Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 708 (D.N.J. 1988); *State of Idaho v. Hanna Min. Co.*, 699 F. Supp. 827 (D. Idaho 1987), *aff'd*, 882 F.2d 392 (9th Cir. 1989); *State of Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 673 (D. Idaho 1986); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 238 (D. Mo. 1985); *United States v. Union Gas Co.*, 586 F. Supp. 1522, 1524 (E.D. Pa. 1984); *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143 (D. Ariz. 1984).

In an attempt to find conflict in this consensus, Asarco mischaracterizes a portion of the D.C. Circuit's decision in *Eagle-Picher*. The petitioners in *Eagle-Picher*, like Asarco, argued that all Bevill wastes contain hazardous constituents and that section 101(14) must be read to exclude Bevill wastes from CERCLA entirely in order for the parenthetical in subsection (C) to have any meaning. The D.C. Circuit, like the Ninth Circuit, rejected this argument:

> Unfortunately for petitioners, they have cited nothing in CERCLA, its legislative history, or the record in this case demonstrating that all or virtually all mining wastes and fly ash have constituents which are "hazardous substances." We have nothing more than

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[2] *See United States v. Iron Mountain Mines*, 812 F. Supp. 1528 (E.D. Cal. 1992), *overruled by Louisiana-Pacific Corp. v. Asarco Inc.*, 24 F.3d 1565 (9th Cir. 1994).

> petitioners' bare assertions on this point. Likewise, petitioners have presented nothing demonstrating that *Congress was of the view* that all or almost all mining wastes and fly ash contain hazardous substances. It is quite possible that *Congress was unconvinced* that enough was known about mining wastes and fly ash for EPA to decide that those substances, as a general rule, posed a threat to the environment, but at the same time *Congress may have been willing* to bring any mining wastes and fly ash found to contain "hazardous substances" within the ambit of section 101(14). Without showing that *Congress believed that* the regulation of mining wastes and fly ash under other subparagraphs of section 101(14) would render the exception in subparagraph (C) meaningless, we are disinclined to reject the plain meaning of section 101(14).

759 F.2d at 928 (italics added).

Asarco misconstrues the D.C. Circuit's decision to have hinged on the failure of the litigants to provide expert testimony regarding the constituents of Bevill wastes, and contends that the D.C. Circuit would have reached a different result if it had seen Asarco's affidavit from Larry Twidwell claiming that all or virtually all Bevill wastes contain hazardous constituents. *See* Asarco Pet. at 14.[3] As the above-quoted passage indicates, however, the D.C. Circuit was concerned with *Congress'* knowledge about Bevill wastes at the time it drafted section 101(14). Asarco's Twidwell affidavit sheds no light on that issue. Accordingly, there is no reason to believe that the D.C. Circuit would disagree with the Ninth Circuit's resolution of this case.

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[3] Asarco's Petition erroneously states that "[a]t trial, Asarco introduced testimony from Dr. Twidwell." Asarco Pet. at 14. In fact, Asarco provided an affidavit from Twidwell in support of a pre-trial motion. After the plaintiffs' deposed Twidwell, Asarco did not call him to testify at trial.

B. The Ninth Circuit's Decision Does Not Conflict With Any Decisions Of This Court.

Unable to find any disagreement among federal courts regarding the interpretation of CERCLA's hazardous substance definition, Asarco contends that the reasoning of the Ninth Circuit in this case conflicts with this Court's precedent on general issues of statutory interpretation. No such conflict exists.

As explained above, the Ninth Circuit based its decision on the plain meaning of the statutory definition of "hazardous substance." The decision follows this Court's holdings that "[i]nterpretation of a statute must begin with the statute's language." *Mallard v. United States Dist. Court for the Southern Dist. of Iowa,* 490 U.S. 296, 300 (1989); *accord United States v. James,* 478 U.S. 597, 604 (1986). Indeed, this Court has consistently held that when statutory terms are clear, courts need not inquire further. *See Fretag v. Commissioner of Internal Revenue,* 111 S. Ct. 2631, 2636 (1991).

Asarco nonetheless argues that the Ninth Circuit should have rejected the statute's plain meaning. Asarco contends that all Bevill wastes contain substances otherwise classified as hazardous by CERCLA and, therefore, the Ninth Circuit's plain meaning of the statute would eliminate any practical effect of subparagraph (C)'s parenthetical excluding Bevill wastes. Even if all Bevill wastes contained and released otherwise hazardous substances, the Ninth Circuit's interpretation of section 101(14) would not render the parenthetical language excluding Bevill wastes from subparagraph (C) meaningless. On the contrary, there simply would be no substances that actually satisfied the theoretical conditions for which Congress provided an exclusion, a possibility that the D.C. Circuit acknowledged when interpreting the definition the same way. *See Eagle-Picher,* 759 F.2d at 928; *see also* 126 Cong. Rec. 3361 (Feb. 20, 1980) (Rep. Beville emphasizing the lack of knowledge regard-

ing the composition of and hazard posed by mining wastes).[4]

Asarco also contends that the Ninth Circuit ignored this Court's precedent by failing to give sufficient consideration to a Senate Report passage regarding Bevill wastes. The statute's language, not a committee report, however, is the best evidence of Congress' intent. *United States v. Monsanto*, 491 U.S. 600, 610 (1989); *Sedima S.P.R.I. v. Imrex Co.*, 473 U.S. 479, 495 n.13 (1985). This Court has refused to "resort to legislative history to cloud a statutory text that is clear." *Ratzlar v. United States*, 114 S. Ct. 655, 662 (1994). Moreover, Asarco conveniently overlooks legislative history supporting the Ninth Circuit's interpretation.[5]

Finally, Asarco contends that, by deferring to EPA's interpretation of CERCLA's hazardous substance definition, the Ninth Circuit's decision conflicts with this Court's precedent. In fact, the Ninth Circuit based its decision on the language of the statute. *See* Pet. App. at B-17 to B-18. The court then properly noted that if

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[4] Asarco's desire to abandon the unambiguous terms of the statute if no Bevill wastes were excluded from CERCLA is contrary to this Court's holding that the "[j]udicial perception that a particular result would be unreasonable . . . cannot justify disregard of what Congress has plainly and intentionally provided." *Commissioner of Internal Revenue v. Asphalt Prod. Co.*, 482 U.S. 117, 121 (1987).

[5] The legislative history indicates, for example, that Congress was aware of the D.C. Circuit's decision in *Eagle-Picher* when it amended CERCLA in 1986, yet it did not amend the statute to overrule the decision. *See* Report of House Committee on Energy and Commerce, reprinted in SARA: The Legislative History 104-52 (S. Clarkson & J. LaMoreaux eds., 1987) (confirming *Eagle-Picher* decision); 132 Cong. Rec. S14896, S14931 (Oct. 3, 1986) (acknowledging the need to address thousands of contaminated mining waste sites); 131 Cong. Rec. S11680-82 (Sept. 18, 1985) (same). Congress' decision not to act in the face of the *Eagle-Picher* decision suggests that Congress agreed with the court's interpretation of the statute. *See Johnson v. Transportation Agency*, 480 U.S. 616, 620 n.7 (1987).

Asarco were correct that the language were ambiguous in light of the legislative history, then the court would reach the same result by relying upon EPA's interpretation of the statutory provision. *See* Pet. App. at B-19 to B-20.[6] The Ninth Circuit's reasoning is consistent with this Court's holdings that courts should defer to an administrative agency's reasonable interpretation when a statute is ambiguous. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988).

C. This Court Need Not Grant Certiorari To Settle An Important Issue Of Federal Law.

Although the status of Bevill mining wastes may have some significance for the mining industry, there is no need for this Court to grant certiorari in light of the existing judicial consensus. The fact that EPA has consistently interpreted CERCLA to treat mining wastes as hazardous constituents, 48 Fed. Reg. 40,658-63 (1983), adds to the consensus on this issue. Accordingly, this Court need not grant certiorari to resolve this issue.

II. THE NINTH CIRCUIT'S DECISION TO AFFIRM THE TRIAL COURT'S FACTUAL FINDING THAT ASARCO "ARRANGED FOR THE DISPOSAL" OF SLAG IS NOT INCONSISTENT WITH ANY OTHER FEDERAL APPELLATE DECISION AND DOES NOT PRESENT AN OPPORTUNITY FOR THIS COURT TO SETTLE AN IMPORTANT ISSUE OF FEDERAL LAW.

Overwhelming evidence at trial demonstrated that Asarco's scheme for selling its slag was an arrangement

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[6] Asarco erroneously contends that EPA has changed its position regarding the status of Bevill wastes by referencing passages from testimony presented by particular EPA personnel to Congressional committees regarding unrelated matters. Official EPA policy is reflected in the preamble to its formally promulgated regulations, the relevance of which the Ninth Circuit acknowledged. *See* Pet. App. at B-20 (citing 48 Fed. Reg. 40663 (1983)).

for disposal. A draft environment impact statement prepared by Asarco described slag as a "waste product" and explained that "[a]s long as the smelter operates there will be a need to dispose of slag." Asarco management conceded that "the main purpose in marketing the slag was simply to dispose of it, to get it off the site." To stay in business, Asarco needed to "get rid of the slag." Asarco considered selling the slag as one way of "disposing of our slag production by some other means than dumping it in the Puget Sound." "[T]he objective [of the marketing scheme] was to get rid of the slag." Asarco contracted with Black Knight, a subsidiary of industrial Mineral Product, to "accept, process and sell, or otherwise dispose of" virtually all of Asarco's waste slag. The contract obligated Industrial Mineral Products to get rid of all of the slag, whether it sold it or not. Rather than trying to make a profit marketing slag, Asarco ultimately waived royalties and canceled debts to help keep Black Knight in business so that it could continue to dispose of its slag.

Based on these facts, the district court found that Asarco had arranged for the disposal of its slag. *See* Pet. App. at A-11 to A-15. Far from marketing a useful product in good faith, the district court concluded that Asarco "concocted a scheme to get rid of their slag, and they were so intent on disposing of this slag so that they could stay in business, they ignored the obvious risks." The Ninth Circuit affirmed the court's factual finding, explaining that slag "is at best a by-product," "with a nominal commercial value." Pet. App. at B-22. Asarco "wanted to get rid of" the slag "whether [it] could sell [it] or not." *Id.* The Ninth Circuit also concluded that the jury's verdict that slag was a product for purposes of the Washington Product Liability Act did not preclude the district court from finding that it was also a waste under CERCLA because the two statutes were enacted for different purposes. Pet. App. at B-21.

Asarco now asks this Court to hear its challenge to the district court's factual finding. The federal courts agree that the sale of hazardous substances may sometimes constitute an arrangement for disposal, depending upon the facts surrounding the transaction. Because this issue is intensely factual in nature, it does not present this Court with an opportunity to settle an important issue of federal law.

A. Federal Courts Agree That Sales May Constitute Arrangements For Disposal Depending Upon The Facts Surrounding The Transactions.

Anyone arranging for the disposal of a hazardous substance is liable under CERCLA for the cost of responding to the release of the hazardous substance. 42 U.S.C. § 9607(a)(3). When confronted with sales of a hazardous substance, federal courts have refused to adopt either a per se rule that all sales are arrangements for disposal, or the contrary rule that sales are never arrangements for disposal. *See, e.g., Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990); *Prudential Ins. Co. v. United States Gypsum*, 711 F. Supp. 1244, 1254 (D.N.J. 1989). Courts have instead held that CERCLA liability depends upon the specific facts of the case.

As a general matter, courts have not imposed liability when a defendant merely sold a new product that it intentionally manufactured to sell at a profit.[7] On the other hand, courts have imposed liability when the defendant sold an unwanted industrial waste or by-product

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[7] *See Stevens Creek Associates v. Barclays Bank of California*, 915 F.2d 1355 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *Dayton Indep. School Dist. v. U.S. Mineral Prod.*, 906 F.2d 1059 (5th Cir. 1990); *Kelly v. Arco Indus. Corp.*, 19 Chem. Waste Lit. Rptr. 1342 (W.D. Mich. 1990); *Prudential Ins. Co. v. United States Gypsum Co.*, 711 F. Supp. 1244 (D.N.J. 1989); *United States v. Westinghouse Elec. Corp.*, 14 Envtl. L. Rep. 20483 (S.D. Ind. 1983).

in order to get rid of it.[8] Determining which category any particular transaction falls into requires a fundamentally factual determination. *See Florida Power*, 893 F.2d at 1317.[9] The district court's specific factual finding that Asarco arranged for the disposal of its slag, and the Ninth Circuit's affirmance of it, therefore, does not conflict with any federal court decision.

B. The Ninth Circuit's Decision Does Not Conflict With *American Mining Congress* Or Other Decisions Interpreting RCRA.

Asarco contends that the Ninth Circuit's decision in this case conflicts with various decisions construing RCRA, including the D.C. Circuit's decision in *American Mining Congress v. United States E.P.A.*, 824 F.2d 1177 (D.C. Cir. 1987). The Ninth Circuit's decision is consistent with these RCRA decisions when read properly, although these cases are of limited relevance to Asarco's liability under CERCLA.

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[8] *See, e.g., Catellus Dev. Corp. v. United States*, 34 F.3d 748 (9th Cir. 1994) (selling used batteries to lead reclamation plant); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130 (N.D. Fla. 1994) (selling used batteries to salvage service); *Chesapeake & Potomac Tel. Co. of Va. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269 (E.D. Va. 1992) (selling spent batteries to recycler); *United States v. Pesses*, 794 F. Supp. 151 (W.D. Pa. 1992) (shipping and selling scrap metal to refabricator); *States v. BFG Electroplating Corp.*, 31 Env't Rep. Cas. (BNA) 1174, 1183 (W.D. Pa. 1990) (sale of contaminated cinder blocks to homeowners for driveway fill); *United States v. Conservation Chemical Corp.*; 619 F .Supp. 162, 234 (W.D. Mo. 1985) (sale of fly-ash); *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985) (sale of contaminated oil for road spreading); *New York v. General Elec. Co.*, 592 F. Supp. 291 (N.D.N.Y. 1984) (sale of contaminated oil for use as dust suppressant on drag strip); *United States v. A&F Materials Co., Inc.*, 582 F. Supp. 842 (S.D. Ill. 1984) (sale of spent caustic solution).

[9] Contrary to Asarco's assertions, courts have not interpreted CERCLA to establish a "useful product defense," excluding from liability all sales of materials having any productive use.

In *American Mining Congress*, the D.C. Circuit held that EPA lacked authority under RCRA to regulate materials "destined for beneficial reuse or recycling in a continuous process by the generating industry itself." 824 F.2d at 1190. RCRA authorizes EPA to regulate hazardous wastes, which it defines to include "discarded materials." The court concluded that materials "destined for immediate reuse in another phase of the industry's ongoing production process" were not discarded. *Id.* at 1185. Such materials had "not yet become part of the waste disposal problem." *Id.* at 1186. EPA, therefore, lacked authority to regulate those materials under RCRA.

In contrast to the materials at issue in *American Mining Congress,* Asarco's slag had become part of the waste disposal problem. Asarco did not immediately recycle its slag in its production process. On the contrary, Asarco discarded the slag by contracting with Black Knight to sell or otherwise dispose of it. In *Owen Electric Steel Company of South Carolina, Inc. v. Browne*r, 37 F.3d 146 (4th Cir. 1994), the Fourth Circuit considered a remarkably similar chain of events under RCRA. In that case, the defendant had generated slag as a by-product of steel production and sold the slag to the construction industry for use as a road base material, among other things. The court concluded that the slag was a discarded material under RCRA; it was "part of the waste disposal problem."

Although these RCRA cases are consistent with the Ninth Circuit's interpretation of CERCLA in this case, it is worth emphasizing that RCRA cases are of limited relevance to Asarco's liability under CERCLA. While RCRA regulates the disposal of solid and hazardous *wastes,* CERCLA broadly imposes liability on those who arrange for the disposal of hazardous *substances. See* 42 U.S.C. § 9607(a)(3); *see also State of Ariz. v. Motorola*, 774 F. Supp. 566, 571 (D. Ariz. 1991); *United States v. Farber*, 27 Env't Rep. Cas. (BNA) 1978, 1980-1981 (D.N.J. 1988). Thus, although Congress de-

fined the term "disposal" in CERCLA by reference to the definition of "disposal" found in RCRA,[10] there is no reason to believe that Congress also intended to limit CERCLA's application to those hazardous substances that are also RCRA "hazardous wastes." Indeed, such an interpretation would be contrary to the plain language of CERCLA section 107, which imposes liability on those who "arranged for disposal . . . of hazardous substances," not those who arrange for disposal of hazardous wastes.

C. The Ninth Circuit's Decision Affirming The District Court's Finding That Asarco Arranged For Disposal Of Slag Does Not Present An Opportunity To Settle An Important Issue Of Federal Law.

In this case, the Ninth Circuit's decision affirmed a factual finding of the district court. Asarco's challenge focuses on that fact-specific determination and the unique circumstances arising from the combination of claims brought by the Plaintiffs in this case. Neither offers an opportunity for this Court to settle an important issue of federal law in a way that will help resolve future CERCLA cases.

As explained above, the question of whether the sale of a hazardous substance constitutes an arrangement for disposal requires a fact-specific inquiry. *See, e.g., Florida Power*, 893 F.2d at 1317. The district court has already resolved that factual issue in this case, and the Ninth Circuit affirmed that decision. A further decision by this Court holding that the district court's ruling was or was not supported by the record is unlikely to provide significant assistance to lower courts deciding cases based upon different sets of facts.

Asarco, however, also attempts to identify a purely legal, indeed constitutional, issue in this factual dispute by contending the district court's conclusion that Asarco

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[10] *See* 42 U.S.C. 9601(29) (CERCLA disposal definition); 42 U.S.C. § 6903(3) (RCRA disposal definition).

had arranged for the disposal of slag, is inconsistent with the jury's verdict that the slag was a product. By concluding that slag was a product for purposes of the Washington Product Liability Act, however, the jury merely found that slag had some value and had been offered for introduction in commerce. As explained above, these facts are entirely consistent with the court's conclusion that the sale of slag was an arrangement for its disposal. Moreover, Asarco conveniently neglects to mention that the jury also found that slag was a waste for purposes of the Washington Hazardous Waste Management Act. When taken together the jury's findings are consistent with the district court's finding that Asarco arranged for the disposal of slag.

In any event, Asarco's legal challenge to the district court's finding and the Ninth Circuit's affirmance of it does not pose a significant issue of federal law. Asarco's challenge to the consistency of the jury verdicts and judicial rulings arises from the peculiar combination of federal and state statutory claims brought in this case. A further decision from this Court would be unlikely to provide precedent useful in other cases.

CONCLUSION

For the foregoing reasons, this Court should deny Asarco's Petition for Writ of Certiorari.

Respectfully submitted this 8th day of December, 1994.

Respectfully submitted,

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